

STATE OF MICHIGAN
COURT OF APPEALS

JAMES RICHARD, JR., TRUST AGREEMENT,
by JAMES RICHARD and DORIS RICHARD,
Trustees,

UNPUBLISHED
August 15, 2006

Plaintiffs-Appellants,

v

No. 268299
Oakland Circuit Court
LC No. 2005-069874-CK

380 FAIR ASSOCIATES, INC.,

Defendant,

and

MICHAEL O’SULLIVAN,

Defendant-Appellee.

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Plaintiffs James Richard, Jr., Trust Agreement, by James Richard and Doris Richard, Trustees, appeal as of right from the trial court’s order denying their motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing the case. We reverse and remand. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

Plaintiffs, a trust and its two trustees, sold commercial real estate to 380 Fair Associates, Inc. (380 Fair) via a land contract.² 380 Fair defaulted on its obligations under the contract. Following summary proceedings, the 43rd District Court entered judgment of possession in plaintiffs’ favor. The district court ordered that 380 Fair pay all of the 2002 and 2003 taxes during the 120-day redemption period. The district court’s order further memorialized the

¹ MCR 7.214(E).

² 380 Fair was dismissed from the case in a prior order and is not a party to this appeal.

parties' agreement that if 380 Fair failed to pay the taxes owing, it would consent to a "pocket" consent judgment in plaintiffs' favor in the amount of \$48,852.12, plus penalties and interest, and that plaintiffs could seek immediate leave to obtain a writ of eviction. 380 Fair failed to pay the 2002 and 2003 taxes, and plaintiffs obtained a writ of eviction from the district court.

Plaintiffs then filed a complaint in the circuit court, seeking past rents, insurance premiums, and taxes as against 380 Fair and, additionally, alleging that defendant Michael O'Sullivan had breached a guaranty, under which he had personally guaranteed to plaintiffs the payment of 380 Fair's indebtedness under the land contract. The guaranty, which was executed along with the land contract, provides in relevant part:

FOR AND IN CONSIDERATION of JAMES M. RICHARD and DORIS M. RICHARD, as Trustees under the JAMES RICHARD, JR. TRUST AGREEMENT UAD 3/21/96 (hereinafter referred to as "Obligee"), accepting the Land Contract dated June 30, 2000 (hereinafter referred to as "Land Contract"), of 380 FAIR ASSOCIATES, INC., a Michigan corporation (hereinafter referred to as "Debtor"), the undersigned MICHAEL M. O'SULLIVAN, individually (hereinafter referred to as "Guarantor"), does hereby guarantee unto the Obligee, directly or contingently, any and all transactions or dealings between Obligee and Debtor. Guarantor covenants, agrees and guarantees that payments for the obligations aforesaid by Debtor to Obligee shall be made to Obligee by the Debtor on or before the date they are due. If any default in any such payment at any time be made by the Debtor, the undersigned Guarantor does hereby unconditionally promise and agree to forthwith pay the amount of the indebtedness owed by the Debtor to the Obligee, including actual attorney's fees, without requiring notice or proof of the demand for payment being made to the extent that proper notice is given to the Debtor. The undersigned Guarantor shall pay such indebtedness to the Obligee on demand as if such indebtedness constituted the Guarantor's direct and primary obligation, and any acceleration against Debtor shall be equally applicable to Guarantor.

* * *

The liability hereunder of the undersigned Guarantor to Obligee shall be direct and absolute. The undersigned Guarantor agrees that in case of nonpayment to Obligee of any obligations to the Debtor when due, at the option of Obligee, Obligee may institute suit and collect from the undersigned Guarantor, whether suit has been commenced against the Debtor or not.

The obligation of the undersigned Guarantor hereunder is absolute and primary and is complete and binding as to the undersigned Guarantor forthwith upon the signing hereof and subject to no condition whatever, precedent or otherwise.

The circuit court entered a "Partial Consent Judgment" ordering 380 Fair to pay, pursuant to the district court's order, \$58,053.19 for taxes due for 2002 and 2003. Plaintiffs voluntarily dismissed the remaining claims against 380 Fair. The circuit court denied plaintiffs' motion for summary disposition on the remaining claim against O'Sullivan as guarantor for payment of the

amount owing under the consent judgment. The circuit court entered a final judgment dismissing the case on the ground that MCL 600.5750 barred the claim.

II. Interpretation Of Guaranty

A. Standard Of Review

Plaintiffs appeal, arguing that the circuit court erred in interpreting the guaranty as a surety agreement and in refusing to enforce the guaranty according to its plain and unambiguous terms.

We review de novo the grant or denial of a motion for summary disposition.³ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.⁴ The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law.⁵

The proper interpretation of a contract is also a question of law that we review de novo.⁶ The primary goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and attempting to apply the plain language of the contract itself.⁷

B. No Limitation Of Liability

The general rules of contract construction apply in interpreting guaranty contracts.⁸ "In construing a contract of guaranty, the intention of the parties should govern. Where the language of the writing is not ambiguous the construction is a question of law for the court, on a consideration of the entire instrument."⁹ Nevertheless, an obligation to assume another's debts will not be found in the absence of a clearly expressed intention to do so.¹⁰

Contrary to O'Sullivan's suggestion, the guaranty does not limit his liability to those amounts for which 380 Fair would be legally obligated to pay under the land contract, or to those amounts for which 380 Fair would have no valid defense. Rather, the guaranty clearly and

³ *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005).

⁴ *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004).

⁵ *Id.*

⁶ *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

⁷ *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000).

⁸ *First Nat'l Bank of Ypsilanti v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW 221 (1935).

⁹ *Id.*, quoting *Griffin Mfg Co v Mitshkun*, 233 Mich 640, 642; 207 NW 814 (1926).

¹⁰ *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 512; 620 NW2d 531 (2001).

unambiguously applies to “*any and all transactions or dealings*” between plaintiffs and 380 Fair. O’Sullivan’s liability under the guaranty is “direct and absolute” and is effective *irrespective* of whether any suit has been commenced against 380 Fair. The guaranty further provides that O’Sullivan’s obligation is “absolute and primary” and “subject to no condition whatever.” Pursuant to these terms, O’Sullivan clearly expressed an intention to assume liability for *any* indebtedness incurred by 380 Fair in its dealings with plaintiffs. 380 Fair’s liability under the consent judgment, which effectuated the agreement reached by 380 Fair and plaintiffs in the summary proceeding, is an indebtedness arising from a transaction between those parties and is therefore subject to the plain terms of the guaranty.

C. Application Of MCL 600.5750

O’Sullivan contends that plaintiffs’ claim is nevertheless barred by application of MCL 600.5750. Land contract summary forfeiture proceedings are governed by MCL 600.5701 *et seq.*¹¹ MCL 600.5750 provides as follows:

The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except that *a judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial and that a judgment for possession after forfeiture of such an executory contract which results in the issuance of a writ of restitution shall also bar any claim for money payments which would have become due under the contract subsequent to the time of issuance of the writ.* The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be. [Emphasis supplied.]

Section 5750 is, “in effect, a [modified] codification . . . of the common-law rule that the forfeiture of an executory contract for purchase of land constitutes an election of remedies, precluding the vendor from later seeking damages for breach of contract.”¹²

O’Sullivan contends that plaintiffs’ claim under the guaranty constitutes a “claim for money payments due or in arrears under the contract at the time of trial” within the meaning of § 5750 and that, since plaintiffs elected to institute forfeiture proceedings and to obtain a writ of restitution against 380 Fair, the claim against O’Sullivan is barred. We disagree. The claim against O’Sullivan as guarantor is simply not a post-forfeiture claim for “money payments due or in arrears under *the [land] contract.*” Instead, the claim is one for liability under the wholly

¹¹ *Wilson v Taylor*, 457 Mich 232, 235 n 1; 577 NW2d 100 (1998).

¹² *Mich Nat’l Bank v Cote*, 451 Mich 180, 182 n 1; 546 NW2d 247 (1996) (citations omitted).

separate and discrete *guaranty contract*.¹³ Although that liability is certainly related to the land contract and the original transaction between 380 Fair and plaintiffs, O’Sullivan is not being sued for amounts he owes under that contract; rather, his liability arises solely from the guaranty, as he was not even a party to the land contract. Moreover, § 5750 expressly provides that the remedy provided by summary proceedings is “in addition to, and not exclusive of, other remedies, either legal, equitable or statutory.”¹⁴

O’Sullivan cites *Michigan Nat’l Bank*, in which this Court held that real estate taxes due under a forfeited land contract were “money payments” within the meaning of § 5750 and, therefore, a judgment for money damages to recover those amounts was barred by the forfeiture, notwithstanding that the taxes were payable to the taxing authorities rather than to the land contract vendor.¹⁵ Unlike the claim against O’Sullivan as guarantor in this case, however, the lawsuit in *Michigan Nat’l Bank* was clearly a prohibited post-forfeiture action to recover amounts owing under the land contract itself.

Finally, O’Sullivan cites *PR Post Corp v Maryland Casualty Co*,¹⁶ for the proposition that he should be able to raise application of § 5750 as a defense in this action. In *PR Post Corp*, the Michigan Supreme Court applied the longstanding rule that a judgment against a principal constitutes prima facie evidence of a surety’s liability on a bond, even if the surety was not a party to the former action, and that in such a case the surety may raise any defense that was available to the principal in the former action.¹⁷ Even assuming that this suretyship rule applies equally to guarantors,¹⁸ it is simply irrelevant. The consent judgment was not entered as a result

¹³ See *McBride v Arends*, 79 Mich App 440; 263 NW2d 5 (1977), in which this Court held that § 5750 did not bar a land contract vendor from bringing a post-forfeiture action against the vendee based on the separate bill of sale, note, and security agreement under which the vendor’s business entity, inventory, and liquor license had been transferred to the vendee. Cf. *VanElsacker v Erzberger*, 137 Mich App 552, 559; 357 NW2d 891 (1984) (holding that where land contract vendors elected, pursuant to their rights under the parties’ purchase and sale agreement, to treat the land contract and a separate promissory note as a *single contractual obligation* in summary proceedings for forfeiture and restitution, the vendors’ suit to recover the balance owed on the promissory note was a “claim for money payments due or . . . which would have become due under the contract” within the meaning of § 5750 and was therefore barred). The *VanElsacker* Court distinguished *McBride*, *supra*, which, like the instant case, involved separate contracts that were not treated by plaintiffs as a single contractual obligation.

¹⁴ See *DeBruyn Produce Co v Romero*, 202 Mich App 92, 107; 508 NW2d 150 (1993).

¹⁵ *Michigan Nat’l Bank*, *supra* at 184-185.

¹⁶ *PR Post Corp v Maryland Casualty Co*, 403 Mich 543; 271 NW2d 521 (1978).

¹⁷ *Id.* at 547-548, quoting 74 AmJur2d, Suretyship, § 152, pp 108-109.

¹⁸ See *Bandit Industries, Inc*, *supra* at 508 n 4, noting that “[t]he main distinction between a contract of suretyship and of guaranty . . . is that while the surety assumes liability as a regular party to the primary undertaking, the guarantor does not, as his or her liability depends on an independent collateral agreement by which he or she undertakes to pay the obligation if the primary payor fails to do so.”

of a prohibited post-forfeiture “claim for money payments” within the meaning of § 5750. Rather, it was entered pursuant to the parties’ own agreement reached *during the forfeiture proceeding itself*. In other words, § 5750 would have served as no defense to 380 Fair with respect to its liability for the 2002 and 2003 taxes, since that liability arose out of the forfeiture proceeding, rather than a separate, subsequent action for amounts due under the land contract.

Reversed and remanded for entry of summary disposition in favor of plaintiffs. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder